

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030



ANSWERS OF THE NATIONAL RIFLE ASSOCIATION TO THE TEXAS HOUSE SELECT COMMITTEE ON MASS VIOLENCE PREVENTION & COMMUNITY SAFETY

August 24, 2020

1. What specific statutes related to the transfer and possession of firearms do you believe need to be strengthened?

Current federal and state firearms law is adequate to target the possession and misuse of firearms by violent criminals.

Under federal law, possession of a firearm by a prohibited person is a felony punishable by up to 10 years imprisonment. Knowingly transferring a firearm to a prohibited person is a felony punishable by up to 10 years imprisonment. Making a false written statement on BATFE form 4473 is a felony punishable by up to 10 years imprisonment.¹

Under state law, unlawful possession of a firearm by a felon is a felony punishable by up to 10 years imprisonment.² Knowingly transferring a firearm to a prohibited person is a Class A Misdemeanor punishable by up to a year in jail.³ Texas statute prohibits "firearm smuggling," defined as when "the person knowingly engages in the business of transporting or transferring a firearm that the person knows was acquired in violation of the laws of any state or of the United States."⁴

Current statutes need to be enforced at both the federal and state level. The committee should request and evaluate detailed reports from state and federal law enforcement agencies in this area before recommending new laws. For instance, according to a September 2018 report by the U.S. Government Accountability Office, 112,000 people were turned down for a gun purchase in FY 2017 and there were a mere 12 prosecutions by U.S. Attorneys' Offices as of June 2018.⁵

¹ 18 U.S.C. §§ 922 and 924.

² Texas Penal Code § 46.04.

³ Texas Penal Code § 46.06.

⁴ Texas Penal Code § 46.14.

⁵ *Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions*, U.S. Government Accountability Office, September 2018, p. 2.

2. NICS is central to background checks and preventing certain persons from purchasing firearms. What specific statutory changes do you believe we need to make regarding information reported for NICS purposes and to improve the quality and responsiveness of that database?

The quality of the data in the Federal Bureau of Investigation's National Instant Criminal Background Check System (NICS) is only as good as what is provided to the system by federal, state, and local authorities.

To incentivize the proper submission of relevant records, NRA worked with Congress to enact the NICS Improvement Amendments Act of 2007 (NIAA).⁶ In general, the provisions of the NIAA are designed to increase the number of disqualifying records that are entered into the NICS database. The record forwarding provisions of the NIAA apply to both federal and state agencies that hold disqualifying records for all prohibited persons categories, but the provisions are mandatory for federal agencies while only providing incentives for state agencies.

Similarly, NRA worked with Congress to enact the Fix NICS Act of 2017.⁷ The legislation provided an additional \$75 million in grants to states to upgrade their records for use with the NICS. The legislation further strengthened submission requirements pertaining to disqualifying records held by federal agencies. Texas Government Code §§ 411.0521 and 411.052 affirmatively provide for the submission of sensitive prohibiting mental health data to the NICS.

On September 5, 2019, Governor Greg Abbott issued an executive order that made all future grants from the Office of the Governor to counties contingent upon a jurisdiction's commitment to report criminal convictions to the Criminal Justice Information System at the Department of Public Safety within seven business days. The order lowers the reporting window to five business days on January 1, 2021.⁸ The committee should recommend the codification of this order to ensure the most up-to-date criminal conviction data is available to the NICS.

3. Can you please identify any gaps in current law that might allow the purchasing and transfer of firearms to persons prohibited by current law from possessing firearms? In other words, how are these persons coming into possession of firearms and what recommendations do you have to prevent them from acquiring firearms?

According to the U.S. Department of Justice (DOJ), 75 percent of criminals in state and federal state prison who had possessed a firearm during their offense acquired the firearm through theft, "Off the street/underground market," or "from a family member or friend, or as a gift." Less than one percent got firearms from dealers or non-dealers at gun shows.⁹

A study by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) of federal armed career criminals showed that while 79 percent had acquired their firearms from "off the street" sales, "criminal acts," and relatives, only six percent had acquired firearms from dealers or non-dealers at gun shows

⁶ NICS Improvement Amendments Act of 2007, PL 110-180, January 8, 2008, 122 Stat 2559.

⁷ Consolidated Appropriations Act, 2018, PL 115-141, March 23, 2018, 132 Stat 348.

⁸ Executive Order GA-07, Gov. Greg Abbott, September 5, 2019, p. 2-3.

⁹ Mariel Alper & Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates*, 2016, U.S. Department of Justice Bureau of Justice Statistics, 7 (2019).

and flea markets.¹⁰ BATFE has also reported, “[t]he most frequent type of trafficking channel identified in ATF investigations is straw purchasing from federally licensed firearms dealers. Nearly 50 percent...”¹¹

As noted in the response to question 1, both federal and Texas law provide severe penalties for prohibited persons found in possession of firearms. In order to prevent prohibited persons from acquiring firearms, Texas and federal authorities should work to vigorously prosecute violent criminals and their enablers under existing state and federal statutes.

4. Can you explain the laws that address the transfer and purchasing of firearms online? What gaps can you identify related to internet purchases? And what specific statutory recommendations do you have to ensure persons not allowed to possess firearms are not able to acquire them online?

Federal law pertaining to firearm transfers is the same, regardless of how people communicate about selling/buying a firearm. The scheme draws a distinction between the retail sale of firearms for profit and the transfer of firearms by individuals for their personal collections and use.

Federal law requires all firearm dealers to be licensed and to initiate a NICS check before transferring a firearm to a non-dealer, regardless of where the transfer takes place.¹² Federal law requires those “dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit” to be licensed as firearms dealers.¹³

Private individuals who are not “dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit” may transfer a firearm to another individual that they do not have reason to believe is prohibited from possessing firearms without performing a federal background check. Texans enjoy this right whether the communication regarding the transfer is initiated by the internet, a want ad, a church newsletter, a club bulletin board, the telephone, or an in-person conversation.

As noted in the response to question 1, both federal and Texas law provide severe penalties for prohibited persons found in possession of firearms and for anyone who knowingly transfers a firearm to such persons. In order to prevent prohibited persons from acquiring firearms, Texas and federal authorities should work to vigorously prosecute violent criminals and their enablers under existing state and federal statutes.

5. Can you please provide an exhaustive list of all persons prohibited by current law from possessing firearms? Do you believe certain other persons should be prohibited from purchasing firearms?

The federal and Texas prohibited person categories are provided at 18 U.S.C. § 922(g), and Texas Penal Code § 46.04, respectively. NRA does not believe that the existing federal and state prohibited persons categories should be expanded.¹⁴

¹⁰ *Protecting America: The Effectiveness of the Federal Armed Career Criminal Statute*, Bureau of Alcohol, Tobacco, and Firearms, March 1992, p. 28.

¹¹ *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers, Chapter 3*, Bureau of Alcohol, Tobacco, Firearms, and Explosives, June 2000, p. 10.

¹² 18 U.S.C. § 922.

¹³ 18 U.S.C. § 921.

¹⁴ Some states have enacted “Emergency Risk Protective Order” or “Red Flag” legislation, which provide for the confiscation of firearms upon the issuance of an ex parte order. NRA opposes this expansion of the prohibited persons categories as it strips an individual of a Constitutional right without due process. Texas already has strong

6. Are persons convicted of a hate crime prohibited from possessing firearms?

Persons convicted of a hate crime are not an enumerated category of individual barred from possessing firearms. However, federal law prohibits the possession of firearms by felons and by persons convicted of a state misdemeanor punishable by more than two years imprisonment.¹⁵

7. What specific statutory recommendation would you have to address stranger to stranger sales that currently don't involve background checks? How could your recommendation(s) be enforced?

As addressed in the answer to question 3, the data shows that further restricting law-abiding individuals' ability to transfer firearms will not prevent violent criminals from obtaining firearms.

Moreover, researchers at the Bloomberg School of Public Health and the UC Davis School of Medicine found that comprehensive background checks and prohibitions based on violent misdemeanors "were not associated with changes in firearm suicide or homicide." The study explained, "Enactment was not associated with significant and specific changes in rates of fatal firearms violence."¹⁶

In 2013, the DOJ's National Institute for Justice studied the efficacy of so-called "universal" background checks. In a white paper, the agency's deputy director determined that the effectiveness of such a policy would be dependent on further draconian gun control measures that Texans and other Americans have repeatedly rejected through their elected representatives. The document makes clear that the effectiveness of "universal" background checks "depends on... requiring gun registration."¹⁷

Expanded Background checks would not have prevented any of the high-profile shootings with 10 or more fatalities in recent years that have led to calls for further gun control, including the 2018 Santa Fe High School and 2019 El Paso Walmart shootings. The perpetrator of the 2017 Sutherland Springs church shooting acquired a firearm pursuant to a background check, despite being prohibited from possessing firearms.¹⁸

8. What happens when someone who is prohibited from purchasing/possessing a firearm tries to purchase a firearm and is discovered and barred because of a background check? Is there any follow up from law enforcement with that person who tried to illegally obtain a firearm? Is the attempted purchase a crime for that person who is prohibited by law?

Following a NICS denial, BATFE determines whether the characteristics of the denial meet agency guidelines for prosecution.¹⁹ As noted in the response to question 1, the U.S. Attorneys Offices pursue almost none of these cases. If the case is not pursued, the federal government provides the Texas Department of Public Safety with the identifying information of the attempted purchaser. Making a false written statement on BATFE form 4473 is a federal felony punishable by up to 10 years imprisonment.²⁰

civil commitment laws that can be used to address individuals experiencing a mental health crisis. See Texas Health & Safety Code Ch. 574.

¹⁵ 18 U.S.C. §§ 921 and 922.

¹⁶ Castillo-Carniglia, Alvaro et al., *California's comprehensive background check and misdemeanor violence prohibition policies and firearm mortality*, 30 *Annals of Epidemiology* 50-56 (2019).

¹⁷ Greg Ridgeway, Ph.D., *Summary of Select Firearm Violence Prevention Strategies*, National Institute of Justice, January 4, 2013, p 5-7.

¹⁸ "Background Checks | NICS," NRA-ILA, <https://www.nraila.org/get-the-facts/background-checks-nics/>.

¹⁹ *Few Individuals Denied Firearms Purchases Are Prosecuted and ATF Should Assess Use of Warning Notices in Lieu of Prosecutions*, U.S. Government Accountability Office, September 2018, p. 2.

²⁰ 18 U.S.C. § 924

Texas Penal Code § 37.10 makes it a Class A Misdemeanor to “knowingly makes a false entry in, or false alteration of, a governmental record.” A “governmental record is defined under Texas Penal Code § 37.01 to include “anything required by law to be kept by others for information of government.” The committee could recommend legislation to alter § 37.01 to include BATFE form 4473 in the definition of “government record” for the purposes of § 37.10.

9. Do you believe the current crime or punishment is effective for possessing a firearm for persons who are prohibited by law?

As noted in the answer to question 1, existing state and federal statute’s and their corresponding punishments are adequate. If there is a perceived lack of effectiveness in these statutes, it is the result of insufficient enforcement of these statutes against violent criminals rather than an inadequacy in the law.

10. Do you have any specific statutory recommendations on addressing straw purchases?

In Texas, a straw purchase transaction of a firearm for a person the purchaser knows to be prohibited from purchasing firearms consists of two federal felonies, a state felony, and a state misdemeanor. Under federal law, knowingly transferring a firearm to a prohibited person is a felony punishable by up to 10 years imprisonment. Making a false written statement on BATFE form 4473 is a felony punishable by up to 10 years imprisonment.²¹ Texas statute prohibits “firearms smuggling,” defined as when “the person knowingly engages in the business of transporting or transferring a firearm that the person knows was acquired in violation of the laws of any state or of the United States.”²² Knowingly transferring a firearm to a prohibited person is a Class A Misdemeanor punishable by up to a year in jail.²³ Therefore, federal and state law enforcement is already equipped with the necessary statutes to combat straw purchasing.

The changes to Texas Penal Code § 37.01 contemplated in the response to question 8 are an additional, yet superfluous, means to address straw purchases.

11. Do you have any specific recommendation on expanding background checks?

NRA does not support the expansion of background checks beyond current federal and state requirements for the reasons elaborated upon in the responses to questions 3 and 7.

12. What specific recommendations could you make regarding the disarming of persons prohibited of possessing firearms?

Under federal and Texas law, possession of a firearm by a prohibited person is a felony punishable by up to 10 years imprisonment.²⁴²⁵ Therefore, a requirement that a person subject to such a prohibition certify that they are not in possession of firearms following a prohibiting conviction or event is redundant.

Moreover, such certification schemes are constitutionally dubious. In *Haynes v. U.S.*, the U.S. Supreme Court determined that because an individual has a Fifth Amendment right against self-incrimination a

²¹ 18 U.S.C. §§ 922 and 924.

²² Texas Penal Code § 46.14.

²³ Texas Penal Code § 46.06.

²⁴ 18 U.S.C. §§ 922 and 924.

²⁵ Texas Penal Code § 46.14.

prohibited persons could not be compelled to register a firearm.²⁶ Likewise, prohibited persons in possession of firearms could not be compelled to comply with any certification requirement.

13. Do you have any other recommendations or opinions on addressing and preventing mass gun violence?

In an article for *Homicide Studies*, titled, “Mass Shootings in America: Moving Beyond Newtown,” Northeastern University Professor of Criminology James Alan Fox debunked the notion that “Enhanced background checks will keep dangerous weapons out of the hands of these madmen.” Fox explained, “Most mass murderers do not have criminal records or a history of psychiatric hospitalization... They would not be disqualified from purchasing their weapons illegally,” and that, “would-be mass killers can usually find an alternative way of securing the needed weaponry.”²⁷

Rather than enact further gun control laws that violent criminals will refuse to follow and the government will be loath to enforce, the state should do everything in its power to embrace law-abiding citizens’ Right-to-Carry for self-defense. This can be done through legislation to eliminate remaining gun-free zones and by joining the growing number of states that respect their residents’ Right-to-Carry without a permit.

In recent years, Texas has provided two sterling examples of how an armed citizen can stop mass violence in or on the property of a location that was once a gun-free zone.

On November 5, 2017, a violent criminal entered the First Baptist Church in Sutherland Springs, Texas and began killing parishioners. Alerted to the attack by his daughter, neighbor Stephen Willeford retrieved an AR-15, rushed to the scene, and shot the attacker at least twice, prompting the gunman to flee.²⁸

On December 29, 2019, an attacker armed with a shotgun entered the West Freeway Church of Christ in White Settlement, Texas and shot two parishioners. Upon becoming aware of the assailant, firearms instructor and volunteer security guard Jack Wilson drew a handgun and shot and killed the murderer.²⁹

In 2015, the Texas Legislature enacted S.B. 11, which removed restrictions on License to Carry holders exercising the right to self-defense on college campuses.³⁰ In 2019, the Texas Legislature enacted S.B. 535, which made it easier for law-abiding gun owners to carry in places of religious worship.³¹ The committee should recommend that the Texas Legislature continue its efforts to remove barriers to law-abiding citizens exercising their right to self-defense.

²⁶ *Haynes v. U.S.*, 390 U.S. 85, 99-100 (1968).

²⁷ James Alan Fox and Monica DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, *Homicide Studies*, January 2013, p. 135-136.

²⁸ Michael J. Mooney, *The Hero of the Sutherland Springs Shooting Is Still Reckoning With What Happened That Day*, *Texas Monthly*, November 2018, <https://www.texasmonthly.com/articles/stephen-willeford-sutherland-springs-mass-murder/>.

²⁹ Jake Bleiberg and Jamie Stengle, *Firearms instructor took out gunman at Texas church service*, *Associated Press*, December 31, 2019, <https://apnews.com/de8a2aebc6d95b9131a08975a5d881f9>.

³⁰ S.B. 11, Texas Legislature, June 13, 2015, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=SB11>.

³¹ S.B. 535, Texas Legislature, June 7, 2019, <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=86R&Bill=SB535>.